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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 328

UNITED STATES TRUST COMPANY OF NEW YORK AND FRANCES SEYMOUR BROKAW, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF GEORGE TUTTLE BROKAW, DECEASED, PETITIONERS

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 68–74) is reported in 39 B. T. A. 783. The opinion of the Circuit Court of Appeals (R. 103–107) is reported in 111 F. (2d) 576.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 15, 1940. (R. 107–108.) The

petition for a writ of certiorari was filed August 13, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Pursuant to a separation agreement ratified in a divorce decree, the decedent in 1929 created a trust to pay income to his former wife during her life for her support and that of their minor child. The trust agreement provided that the decedent and his wife might modify or revoke the trust in whole or in part. He died in 1935.

The question presented is whether that portion of the trust allocable to the decedent's wife, which would otherwise be included in his gross estate under Section 302 (d) of the Revenue Act of 1926, is to be excluded as a transfer "for an adequate and full consideration in money or money's worth." The answer to this question depends upon the applicability and validity of Section 804 of the Revenue Act of 1932, which provides that a relinquishment of dower, etc., or of other marital rights shall not be considered such consideration.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 10–13.

STATEMENT

The material facts as stipulated (R. 89–99, 14–65) and found by the Board of Tax Appeals (R. 68–71) are as follows:

The decedent died on May 28, 1935. He was survived by his former wife, Ann Clare Brokaw, whom he married in 1923, and their daughter, Ann Clare Brokaw, born in 1924, who lived with her mother. (R. 69, 90.)

In a separation agreement dated January 31, 1929, the decedent agreed among other things to discharge certain debts of his wife and to pay her $2,500 per month during her life. The money was to be used for her own support and maintenance and also for the support, maintenance and education of their daughter. Divorce and remarriage were not to affect the provisions of the agreement. The monthly payments were to be a charge upon the estate of the husband in case he predeceased his wife. The wife released all of her rights in the estate of her husband. The agreement contained the following provision (R. 69–70):

> In the event, however, that the husband shall at any time hereafter establish a trust in the principal sum of Four Hundred and twenty-five thousand ($425,000) Dollars, the income of which shall be payable to the wife during her life, then from and after the date that such trust is established, the obligation of the husband and of his estate to make the

> aforesaid payment of Twenty-five hundred ($2500) Dollars a month shall cease, and the income from the said trust shall be accepted by the wife in full satisfaction and discharge of the obligation of the husband to make the aforesaid monthly payments, and the provisions of this agreement with reference to the application of the aforesaid monthly payments shall apply with full force and effect to the income from the said trust. Such trust may be established by the husband during his lifetime, or by will, or by instrument executed during his lifetime, which becomes effective as to the trust upon the death of the husband.
>
> For the purpose of said trust the husband may deposit securities, and such securities shall be valued at the market value as of a date to be agreed upon between the parties in writing; * * *.

The amount of $2,500 per month was fixed by the parties as the approximate amount reasonably required for the support of the wife and daughter, in accordance with their station in life and with the decedent's ability to furnish such support. The parties contemplated that about one-third of the amount would be devoted to the support of the daughter during her minority. The decedent paid his wife $2,500 per month for February, March, April, and May, 1929. (R. 70.)

The wife after January 31, 1929, instituted an action of divorce in Nevada and obtained an abso-

lute decree of divorce from the decedent on May 20, 1929. The decree of the Nevada court ratified and approved the separation agreement and made it enforceable as a part thereof. The decedent then notified his wife that he intended to establish the trust and the two agreed that certain securities should constitute the principal of the trust fund. He delivered the trust agreement on June 12, 1929, to the Guaranty Trust Company and to his wife as the trustees named therein, together with the securities. The fair market value of the securities placed in the trust at the time of its creation was $414,324.50. The wife accepted the trust in lieu of all other payments to be made to her by the decedent. (R. 70–71, 94–96.)

The trust income was payable to the wife during her life, and she was given a power of appointment by will over $200,000 of the corpus. The balance of the corpus, or the entire corpus in case there should be no valid exercise of the power of appointment, was to go to the daughter at the death of the wife or to her lawful issue, if any. If she should leave no issue, then the corpus was to go to the decedent, or as he should appoint by will. The trust agreement contained a provision that the decedent and his wife might terminate, modify, alter, or revoke the trust in whole or in part. (R. 71.)

The wife was twenty-six years of age when the trust was established. The daughter was then four

and one-half years of age. The then value of an annuity of $30,000 payable to a person then twenty-six years of age was $529,794.12. (R. 71.)

The decedent made no further monthly payments to his wife after May, 1929, but thereafter the wife received the net income of the trust. The gross income of the trust varied from $22,097.32 in 1931 to $13,679.89 in 1936. The securities constituting the trust fund were of the fair market value of $312,884.47 at the date of the decedent's death. The Commissioner included that amount in the gross estate. (R. 71.)

Upon review, the Board reversed the Commissioner, holding that no part of the corpus was to be included in the gross estate. The court below reversed; however, it did hold that the portion of the trust allocable to the support of the child was not to be included, and it remanded the case for a finding as to the value of that portion. (R. 107.)

ARGUMENT

The Commissioner included the corpus in the decedent's gross estate under Section 302 (d) of the Revenue Act of 1926, as amended, since the trust instrument reserved (R. 51, 71) to the decedent the right to modify, alter or revoke the trust at any time in conjunction with his divorced wife. Section 302 (d) specifically requires that there be included in a decedent's gross estate any property of which he has made a transfer "where the enjoy-

ment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke * * *." And this Court has held that these provisions are applicable and constitutional even where the other person is a beneficiary. *Helvering* v. *City Bank Co.*, 296 U. S. 85.

Petitioners seek to escape the tax upon the sole ground that Section 302 (d) is by its own terms inapplicable here, since they assert that the transfer was made "for an adequate and full consideration in money or money's worth." But Section 804 of the Revenue Act of 1932 (see Appendix, *infra*) added a new provision to the title containing Section 302 (d), and provided that for the purposes of that title "a relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, shall not be considered to any extent a consideration 'in money or money's worth.'" The decedent herein died nearly three years after the enactment of the foregoing amendment.

The Circuit Court of Appeals ruled that the relinquishment of the annuity was founded upon marital rights of the type specified in the amendatory provisions. It held, therefore, that in the circumstances those provisions applied to such a re-

linquishment. The court's conclusion on this point seems clearly correct, and there are no decisions to the contrary.

Petitioner's primary complaint seems to be, not that the amendatory provisions were held applicable to this type of situation, but rather that they were held applicable here where the trust was established prior to their enactment. But the identical amendatory provisions were applied with respect to a contract executed before their enactment in *Meyer's Estate* v. *Commissioner,* 110 F. (2d) 367 (C. C. A. 2d),[1] and this Court denied certiorari on June 3, 1940, No. 1004, 1939 Term. There is no additional reason for further review herein.

The decision below is clearly correct. Although the new provisions were enacted in 1932, the decedent did not die until 1935. It was then, for the first time, that the statute had any impact upon the transaction in question. Moreover, since the new provisions were really only a clarifying or "definitory" amendment (R. 104), and since the petitioners are in essence seeking the benefit of a deduction, there is completely absent that arbitrariness or caprice that might otherwise call into play the due process clause of the Fifth Amendment.

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[1] *Accord: Empire Trust Co.* v. *Commissioner*, 94 F. (2d) 307 (C. C. A. 4th); *Sheets* v. *Commissioner*, 95 F. (2d) 727 (C. C. A. 8th).

CONCLUSION

There is no conflict of authority and no sufficient reason for further review. The petition should be denied.

Respectfully submitted,

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AUGUST, 1940.